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## **Empty Rituals or Workable Models? Towards a Business and Human Rights Treaty**

**by Claire Methven O'Brien & Jolyon Ford**

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## EMPTY RITUALS OR WORKABLE MODELS? TOWARDS A BUSINESS AND HUMAN RIGHTS TREATY

JOLYON FORD\* AND CLAIRE METHVEN O'BRIEN\*\*

### I INTRODUCTION

Within the still-emerging field of business and human rights ('BHR'), the question of whether a treaty is required in order meaningfully to address BHR 'governance gaps'<sup>1</sup> is one that is attracting renewed advocacy, commentary and diplomatic activity. By contrast, when the United Nations ('UN') Guiding Principles on Business and Human Rights ('UNGPs') were first adopted in 2011, the balance of opinion amongst duty-bearers appears to have been that this issue should be set aside.<sup>2</sup> At any rate, the Human Rights Council appeared to accept at that time that its immediate focus should instead be on promoting national-level implementation of the UNGPs. This was not an unreasonable position since the premise of the UNGPs, and of the UN 'Protect, Respect, Remedy' Framework from which they proceeded,<sup>3</sup> was that they merely re-articulated the

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Both authors thank the editors, and wish to thank the anonymous reviewers for comprehensive input.

1 John Ruggie, *Just Business: Multinational Corporations and Human Rights* (W W Norton, 2013) xxiii; see generally John Ruggie, *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc E/CN.4/2006/97 (22 February 2006) 4–9 [9]–[30] ('*Interim Report*').

2 John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011) ('*Ruggie Report*') annex, adopted by the Human Rights Council: *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, UN GAOR, 17<sup>th</sup> sess, 33<sup>rd</sup> mtg, Agenda Item 3, UN Doc A/HRC/RES/17/4 (6 July 2011, adopted 16 June 2011) ('*Guiding Principles Resolution*'). See also John Ruggie, 'Treaty Road Not Travelled' [2008] (May) *Ethical Corporation* 42.

3 John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect, Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (7 April 2008) ('*Protect, Respect, Remedy Report*'), adopted by the Human Rights Council: *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 8/7, UN GAOR, 8<sup>th</sup> sess, 28<sup>th</sup> mtg, UN Doc A/HRC/RES/8/7 (18 June 2008) ('*Protect, Respect, Remedy Framework Resolution*').

contemporary implications of duties arising under existing human rights laws and that no supplementary legal basis either authorising or obliging states to implement them was required.

At the same time, the Human Rights Council acknowledged that the UNGPs' arrival might not entirely preclude discussions of how international legal frameworks could further evolve in the longer term to address business-related challenges to human rights.<sup>4</sup> In the event, the question of further 'enhancement' of the UNGPs was revived sooner than many anticipated. A resolution narrowly adopted in the Human Rights Council in 2014 created an Open-ended Intergovernmental Working Group ('OEIWG') 'to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.<sup>5</sup> This mandate, which both resulted from and further stimulates debate of the treaty question, also means that attention has been turning, albeit gradually and somewhat fitfully,<sup>6</sup> from whether any treaty should be transacted to what particular form it might take.

In this article, we do not seek to engage directly with ongoing discussions regarding the potential merits, and conversely the risks, of seeking to conclude a BHR treaty at all.<sup>7</sup> Instead, our aim is to promote a greater focus, in the context

4 The Council stated that the UNGPs were adopted 'without foreclosing any other long-term development, including ... enhancement of standards', and acknowledged the possibility that 'further efforts to bridge governance gaps' were necessary, including at the international level: *Guiding Principles Resolution*, UN Doc A/HRC/RES/17/4, para 4, Preamble para 6. See also *Ruggie Report*, UN Doc A/HRC/17/31, 5 [13].

5 *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, HRC Res 26/9, UN GAOR, 26<sup>th</sup> sess, 37<sup>th</sup> mtg, Agenda Item 3, UN Doc A/HRC/RES/26/9 (14 July 2014, adopted 26 June 2014) para 1 ('*OEIWG Resolution*') (sponsored by Ecuador and South Africa, co-sponsored by Bolivia, Cuba and Venezuela). The OEIWG is mandated to engage in 'constructive deliberations on the content, scope, nature and form of the future international instrument' and 'prepare elements for the draft legally binding instrument for substantive negotiations': at paras 3–4. A parallel Norwegian-sponsored resolution was adopted without a vote which did not provide explicitly for any treaty process: *Human Rights and Transnational Corporations and other Business Enterprises*, HRC Res 26/22, UN GAOR, 26<sup>th</sup> sess, 39<sup>th</sup> mtg, Agenda Item 3, UN Doc A/HRC/RES/26/22 (15 July 2014, adopted 27 June 2014) ('*Human Rights and Transnational Corporations Resolution*'). It is not necessary here to consider the reasons for these parallel developments: see generally International Commission of Jurists, 'Needs and Options for a New International Instrument in the Field of Business and Human Rights' (Report, June 2014) ('*ICJ Report*'); Jolyon Ford, 'Business and Human Rights: Emerging Challenges to Consensus and Coherence' (Briefing Paper, Chatham House, Royal Institute of International Affairs, February 2015). For a summary of the adoption of both resolutions, see Irene Pietropaoli, 'High Tide in Lake Geneva: Business and Human Rights Events at the 26<sup>th</sup> Session of the UN Human Rights Council', *Business and Human Rights Resource Centre* (online), 27 June 2014 <[https://business-humanrights.org/sites/default/files/media/high\\_tide\\_in\\_lake\\_geneva.pdf](https://business-humanrights.org/sites/default/files/media/high_tide_in_lake_geneva.pdf)>.

6 For example, while the Russian Federation voted in favour of the OEIWG's creation, at the 2<sup>nd</sup> session its delegation made oral comments suggesting that discussion of a BHR treaty remained premature because a longer period was required before the efficacy of the UNGPs could be properly evaluated: see *Opening of Session – 1st Meeting, 2nd Session of Open-ended Intergovernmental Working Group on Transnational Corporations* (UN Web TV, 2016) 1:31:50–1:37:10.

7 See, eg, Institute for Human Rights and Business, 'Business and Human Rights Treaty' (Blog Series, 3 June 2014 – 3 July 2015) <<http://www.ihrb.org/tags.html?tag=business+and+human+rights+treaty>> (now republished as individual commentaries). See also Business and Human Rights Resource Centre, 'Debate the Treaty' (Blog Series, 2015–2017) <<http://business-humanrights.org/en/about-us/blog/debate-the>>.

of the BHR treaty debate, on regulatory effectiveness. That is, we believe that proposals for a BHR treaty should be assessed in terms of their likely efficacy, relative to other available forms of regulatory intervention, in advancing effective enjoyment of human rights in the business context. Whereas many contributions to the BHR treaty debate so far have explicitly or implicitly advocated one or other treaty model they have side-stepped the difficult question of how practically effective these models might be in influencing the conduct of duty bearers. A lengthy 2014 International Commission of Jurists ('ICJ') report on the topic, for example, declined to evaluate the potential impact of a BHR treaty on state compliance or business engagement with human rights.<sup>8</sup> Instead, the report opted to '[set] aside' consideration of 'deficiencies in the practical application of standards';<sup>9</sup> its finding that a new instrument had 'clear potential to be effective'<sup>10</sup> thus ranking as mere assertion.

While advocating greater discussion of the question of regulatory effectiveness in the context of BHR treaty debates,<sup>11</sup> we do not attempt here to advance a comprehensive analysis of all BHR treaty models from that perspective, albeit such an endeavour is warranted. Rather, given space constraints, our aim is more limited. Namely, we seek to gauge a selection of potential BHR treaty designs by reference to just one possible criterion of regulatory effectiveness: that any new BHR instrument should not embody or promote formalistic, perfunctory, superficial state compliance, or 'regulatory ritualism'.

Charlesworth and others have diagnosed problematic patterns in state compliance with obligations arising under human rights treaties and in the context of the Human Rights Council's Universal Periodic Review ('UPR')

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treaty>. For a regularly updated repository of BHR treaty debate materials, see Business and Human Rights Resource Centre, *Binding Treaty: Statements, Initiatives & Commentaries* <<http://business-humanrights.org/en/binding-treaty/statements-initiatives-commentaries>>. One of us has elsewhere expressed scepticism over the need for a treaty process, especially so soon after the UNGPs' unanimous adoption: Jolyon Ford, 'Business and Human Rights: Bridging the Governance Gap' (Research Paper, Chatham House: Royal Institute of International Affairs, September 2015). See also *ICJ Report*, above n 5, 39.

8 *ICJ Report*, above n 5, 8–9.

9 *Ibid* 8, 41.

10 *Ibid* 41.

11 A discrete literature exists on human rights treaty effectiveness: see, eg, Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behaviour?' (1999) 36 *Journal of Peace Research* 95; Douglass Cassel, 'Does International Human Rights Law Make a Difference?' (2001) 2 *Chicago Journal of International Law* 121; Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935; Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49 *Journal of Conflict Resolution* 925; Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005); Wade M Cole, 'Human Rights as Myth and Ceremony? Reevaluating the Effectiveness of Human Rights Treaties, 1981–2007' (2012) 117 *American Journal of Sociology* 1131. See also Michael O'Flaherty and Claire Methven O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' (2007) 7 *Human Rights Law Review* 141. Aside from the human rights sphere, and beyond the scope of this article, there exists a wider literature on treaty effectiveness: see, eg, Efraim Chalamish, 'Do Treaties Matter? On Effectiveness and International Economic Law' (2011) 32 *Michigan Journal of International Law* 325.

which they denote by the term ‘ritualism’. This concept was developed through a 2010–15 research project led by Charlesworth at the Centre for International Governance and Justice at the Australian National University.<sup>12</sup> This body of work has not yet addressed the BHR treaty question, however. Accordingly, our intended contribution in this article is to explore the potential of some possible BHR treaty designs to avoid the various weaknesses signalled by the ‘ritualism’ hypothesis.<sup>13</sup> Hence we select four possible BHR treaty variants and venture a preliminary assessment of the extent to which each may be exposed to the risk of ritualism: a broad-spectrum, single BHR treaty; a narrow-spectrum BHR treaty on abuses amounting to international crimes; a declaratory instrument; and a ‘framework’ convention focused on promoting domestic implementation of the UNGPs including via the mechanism of BHR national action plans (‘NAPs’).<sup>14</sup> Whereas one of us has elsewhere already expressed views in favour of the latter design for other reasons,<sup>15</sup> based on the insights emerging from this exercise, we

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- 12 For the research project homepage, see School of Regulation and Global Governance, Australian National University, *Strengthening the International Human Rights System: Rights, Regulation and Ritualism* (12 February 2016) <<http://regnet.anu.edu.au/research/research-projects/details/535/strengthening-international-human-rights-system-rights>>. See also Hilary Charlesworth, ‘Swimming to Cambodia: Justice and Ritual in Human Rights after Conflict’ (2010) 29 *Australian Year Book of International Law* 1; Hilary Charlesworth and Emma Larking, ‘Introduction: The Regulatory Power of the Universal Periodic Review’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rights and Ritualism* (Cambridge University Press, 2014) 1; Benjamin Authers et al, ‘Introduction: The Rituals of Human Rights’ (2018) forthcoming *Humanity* (copy on file with authors). The last source develops the same authors’ paper: Benjamin Authers et al, ‘The Rituals of Human Rights’ (Paper presented at The Rituals of Human Rights Workshop, Centre for International Governance and Justice, Australian National University, 25–27 June 2014). The research project drew on various studies in domestic regulatory settings unrelated to human rights: see especially John Braithwaite, Toni Makkaï and Valerie Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar, 2007).
  - 13 We focus only on proposals for a treaty that would regulate state duties, putting aside those which envisage an instrument that would establish human rights duties on corporate actors under international law: see, eg, David Bilchitz, ‘The Necessity for a Business and Human Rights Treaty’ (2016) 1 *Business and Human Rights Journal* 203.
  - 14 See also Claire Methven O’Brien et al, ‘National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks’ (Report, Danish Institute for Human Rights and International Corporate Accountability Roundtable, June 2014); Claire Methven O’Brien et al, ‘National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool’ (2015) 1 *Business and Human Rights Journal* 117, 121; Damiano de Felice and Andreas Graf, ‘The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with respect to the UN Guiding Principles on Business and Human Rights’ (2015) 7 *Journal of Human Rights Practice* 40. See also United Nations Working Group on Business and Human Rights, *State National Action Plans* (2017) Office of the High Commissioner for Human Rights <[www.ohchr.org/EN/issues/Business/Pages/NationalActionPlans.aspx](http://www.ohchr.org/EN/issues/Business/Pages/NationalActionPlans.aspx)>.
  - 15 Claire Methven O’Brien, Submission to the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, 30 September 2016 <<https://business-humanrights.org/en/for-a-business-and-human-rights-treaty-based-on-progressive-national-implementation-of-the-ungps-and-modelled-after-the-who-framework-convention-on-tobacco-control>>. See also Letter from Claire Methven O’Brien, Danish Institute for Human Rights to the Members of the UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, 28 February 2011 <<https://business-humanrights.org/sites/default/files/documents/Methven%20O'Brien%20UNWG%20sub280212-1.pdf>>. The letter presents an outline for ‘a scheme for a global framework instrument on business and human rights’: at 1–2. See also Claire Methven O’Brien,

tentatively suggest that it also has the virtue of appearing more likely than the other models that we consider here to avoid or reduce mere ritualistic compliance.

Finally, we engage in some further reflection on one important point of distinction between the ritualism critique and broader treaty effectiveness literature. As indeed recognised by Charlesworth and others, treaty-based participatory and performative rituals may, under certain conditions, potentially contribute to strengthening human rights commitments and building convergence on standards, rather than collapsing into ritualism. In Part IV, we try in a preliminary way to highlight some of the implications of this for a framework convention regime.

Before proceeding, two caveats are needed. First, as stated, our focus here is on what particular form of BHR treaty would be most effective, understood in the restricted sense just described, rather than on the question of whether a treaty should be pursued at all. Nonetheless, it remains our view that the case for attempting to implement a BHR treaty, at this particular moment in time, still needs to be argued, rather than assumed, and evidence supplied to demonstrate how a treaty would ‘work better’ than the UNGPs, or indeed other non-treaty approaches, in addressing current governance gaps.<sup>16</sup> Moreover, the current BHR treaty process in the context of the OEIWG faces conceptual, legal doctrinal and diplomatic challenges, as would, in our view, any similar endeavour seeking to conclude a single comprehensive BHR instrument.<sup>17</sup>

Secondly, despite the unanimous adoption of the UNGPs by the Human Rights Council in 2011, and their status as a ‘common reference point’ in BHR,<sup>18</sup> they are not without their critics amongst scholars, activists and governments.

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‘Transnational Business and Human Rights: The Case for a Multi-level Governance Approach’ (Position Paper, March 2007).

- 16 Ford, ‘Bridging the Governance Gap’, above n 7, 22–8; see also Jolyon Ford, ‘The Risk of Regulatory Ritualism: Proposals for a Treaty on Business and Human Rights’ (Working Paper No 118, Global Economic Governance Programme, April 2016) 21–3. See also *Interim Report*, UN Doc E/CN.4/2006/97, 20 [81].
- 17 The OEIWG’s first session revealed the scale and complexity of the challenge of elaborating a single binding international instrument: *Report on the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument*, UN Doc A/HRC/31/50 (5 February 2016) (‘*OEIWG First Session Report*’). The report of the OEIWG’s second session shows that little progress has been made towards the development of specific legislative proposals in three years since the mandate’s establishment: *Report on the Second Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights*, UN Doc A/HRC/34/47 (4 January 2017) (‘*OEIWG Second Session Report*’). See also Carlos Lopez and Ben Shea, ‘Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session’ (2016) 1 *Business and Human Rights Journal* 111, 113–14; Douglass Cassel, ‘Treaty Process Gets Underway: Whoever Said It Would Be Easy?’ on Business and Human Rights Resource Centre, *Debate the Treaty* (13 July 2015) <<https://business-humanrights.org/en/treaty-process-gets-underway-whoever-said-it-would-be-easy>>. For objections to the single comprehensive BHR treaty model, see Ford, ‘The Risk of Regulatory Ritualism’, above n 16, 21–4; O’Brien, ‘Submission to the OEIWG’, above n 15, 5–6.
- 18 David Bilchitz and Surya Deva, ‘The Human Rights Obligations of Business: A Critical Framework for the Future’ in David Bilchitz and Surya Deva (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 1, 2.

Critics have, for instance, sought the articulation of standards establishing ‘direct’ human rights obligations on businesses, specific extraterritorial obligations on states, and the creation by the Human Rights Council of dedicated adjudicatory or remedial mechanisms. Discussion of critiques of the UNGPs is beyond the scope of this article, but since we base our NAPs-related model on the UNGPs, it is worth noting that, in our view, many criticisms of the UNGPs as ‘soft’ or ‘voluntary’ misconceive the extent to which they reiterate clear existing duties on states to protect human rights from, and ensure access to remedy for, corporate and other sources of abuse.<sup>19</sup>

## II RITUAL, RITUALISM AND HUMAN RIGHTS COMPLIANCE

Charlesworth’s research project understood as ‘ritual’ ‘ceremonies or formalities that, through repetition, entrench the understandings and the power relationships that they embody’ and become ‘a means of enacting a social consensus’.<sup>20</sup> The study highlights, amongst other things, the repetitive vocabulary used in human rights treaties and resolutions as well as routine yet carefully managed processes and performances in which states engage with respect to human rights reporting, reviews and recommendations.<sup>21</sup> The project more broadly explores how, through its ritual-heavy institutions, symbols and discourses, law is authorised and reinforced: it is a ‘culturally constructed system of symbolic communication’<sup>22</sup> involving ‘public, socially structuring events’ and modes of communication that follow ‘recognisable and predictable patterns’.<sup>23</sup> If human rights have become the doctrinal expression of ‘modernity’s secular religion’,<sup>24</sup> the contributors to the project argue, the textual articulation of its norms and their public performance via UN human rights forums are as ceremonial and reiterative as religious practices.<sup>25</sup> In examining how such processes have become central features of the international human rights system, the contributors identify how ‘emotionally potent rituals’ such as state human rights reporting and the generation of recommendations via the UPR process ‘may generate politically engaged transformation’, noting in the case of the UPR an ‘unprecedented level of coordination and communication on human rights’.<sup>26</sup>

19 The premise that the UNGPs did not go ‘far enough’ underlies the principal collection of critical essays: see Bilchitz and Deva, above n 18, 18–24. See also Chip Pitts, ‘The United Nations “Protect, Respect, Remedy” Framework and Guiding Principles’ in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge, 2016) 51.

20 Charlesworth and Larking, ‘Regulatory Power’, above n 12, 8–9.

21 Ibid 9.

22 Authers et al, ‘Introduction: The Rituals of Human Rights’, above n 12, 1–2.

23 Authers et al, ‘Paper for The Rituals of Human Rights Workshop’, above n 12, 1.

24 Ibid 3, citing Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press, 2006) 2.

25 Authers et al, ‘Introduction: The Rituals of Human Rights’, above n 12, 3.

26 Charlesworth and Larking, ‘Regulatory Power’, above n 12, 18.



While compliance *rituals* thus can have regulatory or transformative power, at least under certain conditions,<sup>27</sup> *ritualism*, in contrast, is diagnosed as problematic. For Charlesworth, ‘ritualism’ is observed where a subject avoids substantive compliance with norms while at the same time superficially manifesting their acceptance via participation in associated institutions and procedures.<sup>28</sup> Beyond the human rights sphere, such patterns have been shown to undermine even supposedly enlightened regulatory endeavours intended to embody empowerment and participatory strategies.<sup>29</sup> Inside the human rights system, Charlesworth and Larking observe, this tendency manifests in states’ satisfaction of formal reporting and review requirements, coupled with conduct that in fact tends to defeat real compliance with human rights’ substantive norms.<sup>30</sup> ‘Ritualism’ is thus the ‘acceptance of institutionalized means for securing regulatory goals while losing all focus on achieving the goals or outcomes themselves’,<sup>31</sup> with the ‘learned ignorance’ of shallow compliance-verification behaviours as one of its symptoms.<sup>32</sup>

Regulatory ritualism may hence emerge when excessive attention is paid, whether by states or other actors, to the formalities associated with acceptance of international human rights norms. Indeed, states have been observed to embrace human rights language and Geneva reporting procedures precisely to deflect more searching investigations into their substantive respect for the standards in question.<sup>33</sup> Ritualistic behaviour may then arise unwittingly or by calculated design. While complying with reporting and review procedures in multilateral forums, a state may in reality be incapable, indifferent or highly resistant to pursuing progress in realising the human rights in question.<sup>34</sup> Such forums can thus permit states to mobilise human rights language in ways that serve to

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27 See Part IV below.

28 Charlesworth and Larking, ‘Regulatory Power’, above n 12, 10.

29 Braithwaite, Makkai and Braithwaite, above n 12, 258–9. Recently, beyond the BHR sphere, at least one UN human rights body has canvassed the risk of ritualistic compliance, while deliberating on the merits of pursuing the negotiation of an optional protocol. Noting Charlesworth’s critique, an Expert Group under the Permanent Forum on Indigenous Issues has suggested that state ‘commitment’ to a new human rights instrument can help disguise a lack of commitment to human rights norms in far more subtle ways than outright rejection of them: Secretariat of the Permanent Forum on Indigenous Issues, Department of Economic and Social Affairs (UN), *Concept Note: Expert Group Meeting: Dialogue on an Optional Protocol to the UN Declaration on the Rights of Indigenous Peoples*, UN Doc PFII/2015/EGM (27–29 January 2015) 10–11.

30 Charlesworth and Larking, ‘Regulatory Power’, above n 12, 10; Authers et al, ‘Paper for The Rituals of Human Rights Workshop’, above n 12, 4.

31 Braithwaite, Makkai and Braithwaite, above n 12, 7, quoted in Charlesworth and Larking, ‘Regulatory Power’, above n 12, 10.

32 Braithwaite, Makkai and Braithwaite, above n 12, 219, quoting Michael Power, *The Audit Society: Rituals of Verification* (Oxford University Press, 1997) 123.

33 Charlesworth, ‘Swimming to Cambodia’, above n 12, 12–13; see, eg, Bulto’s study of African states’ approach to Geneva processes: Takele Soboka Bulto, ‘Africa’s Engagement with the Universal Periodic Review: Commitment or Capitulation’, in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rights and Ritualism* (Cambridge University Press, 2014) 235.

34 Charlesworth and Larking, ‘Regulatory Power’, above n 12, 10.

obstruct effective accountability for abuses, while allowing them to reap the associated reputational benefits and legitimacy.<sup>35</sup>

In the UPR, for instance, ‘cooperation’, that is, regular participation in reporting processes and meetings, can readily coexist with a state’s reluctance to strengthen human rights protections.<sup>36</sup> Kälén, one of the project’s contributors, suggests that the very universality of human rights norms and the UPR process in fact encourages ritualism by including states with poor records and low commitment.<sup>37</sup> In relation to recommendations made by treaty bodies and other mechanisms, Oberleitner, another contributor to the research project, echoes Charlesworth in emphasising the need to avoid follow-up actions becoming repetitive, formalistic and ‘self-serving’ exercises that allow states to accept norms ‘perfunctor[ily]’.<sup>38</sup> Some contributors venture an even broader critique that:

Through rituals based on a mixture of reiteration, symbolic language, and ceremonial performance, the idea that justice in the world can be achieved via human rights, and that these rights represent a politically neutral moral consensus, is established and entrenched.<sup>39</sup>

Ritualism at this systemic level might conceivably over-promise transformation while masking the limited scope for the human rights paradigm, as currently institutionalised by states, to address structural inequalities and exclusions.<sup>40</sup>

Besides Charlesworth’s project, of course, various scholars have addressed the topic of ‘treaty effectiveness’. Earlier work in the sociology of law, for instance, explored treaties as ‘myths’, in the sense that their efficacy and legitimacy was taken as given without specific empirical evidence of impact in achieving their regulatory objectives.<sup>41</sup> Later, Hafner-Burton and others explored the extent to which state ratification of human rights instruments was

35 Ibid 18. Mares has noted that such initiatives can generate largely ‘symbolic’ or ceremonial conformity without necessarily advancing substantive protections: Radu Mares, ‘Business and Human Rights after Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress’ in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2012) 1, 34.

36 Charlesworth and Larking, ‘Regulatory Power’, above n 12, 16, 18.

37 Walter Kälén, ‘Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rights and Ritualism* (Cambridge University Press, 2014) 25, 31–41.

38 Gerd Oberleitner, ‘Countering Ritualism: What Does It Mean to Follow-up Human Rights Recommendations?’ (Paper presented at The Rituals of Human Rights Workshop, Centre for International Governance and Justice, Australian National University, 25–27 June 2014) 1, 4 <<http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-08/11%20Oberleitner%2C%20Countering%20Ritualism.pdf>>.

39 Emma Larking, ‘Human Rights Rituals: Masking Neoliberalism and Inequality, and Marginalising Alternative World Views?’ (2017) (unpublished, copy on file with authors) 3.

40 See also Jane K Cowan, ‘The Universal Periodic Review as a Public Audit Ritual’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rights and Ritualism* (Cambridge University Press, 2014) 42, 61–2.

41 John W Meyer and Brian Rowan, ‘Institutionalised Organisations: Formal Structure as Myth and Ceremony’ (1977) 83 *American Journal of Sociology* 340. See also Cole, above n 11.

‘ceremonial’ in the sense of having little impact on wider state practice.<sup>42</sup> Others have contended that formal participation in Geneva-based procedures and other forums can become ‘decoupled’ from domestic measures to promote and protect human rights.<sup>43</sup> Treaty-based processes, such analysts maintain, can on occasion be observed as diverting momentum from local efforts towards substantive change. Treaty procedures may hence allow states to clothe themselves in the mantle of ‘doing something’<sup>44</sup> while failing to progress needed reforms, institutionalisation and capacity strengthening on human rights at home. Accordingly, it has even been claimed that human rights treaties have the character of ‘empty promises’,<sup>45</sup> in that they can provide a pretext for misplaced confidence that the treaty mechanism per se will resolve human rights breaches.

Importantly, Charlesworth’s ritualism critique is distinct from this broader treaty effectiveness scholarship in various ways.<sup>46</sup> For a start, it does not share the overt scepticism often found in that literature regarding states’ motives for entering and ‘complying’ with treaty regimes. Nor does it seek to question the assumption that the negotiation and adoption of instruments can improve the promotion of human rights (or at least not harm them) as that literature tends to.<sup>47</sup> Some scholars, for instance, claim to show that human rights treaty ratification fails to produce substantive effects, and may in fact worsen states’ human rights performance, with the role that ratification can play in offering states a form of legitimating cover advanced as one possible vector for this.<sup>48</sup> Hathaway, for instance, maintains that ratification and participation may or may not be sincere, and yet be counted as demonstrating state engagement or even compliance in both cases.<sup>49</sup> This, she argues, is harmful because the pressure a state might otherwise be under to comply is weakened by recognition of its record of participation in the procedures of an international regime. Such contentions in some ways resonate with the thrust of Charlesworth’s critique. Nevertheless, Charlesworth does not go so far as to advance claims concerning the net impact

42 Emilie M Hafner-Burton and Kiyoteru Tsutsui, ‘Human Rights in a Globalising World: The Paradox of Empty Promises’ (2005) 110 *American Journal of Sociology* 1373; Emilie M Hafner-Burton and Kiyoteru Tsutsui, ‘Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most’ (2007) 44 *Journal of Peace Research* 407; Emilie M Hafner-Burton, Kiyoteru Tsutsui and John W Meyer, ‘International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties’ (2008) 23 *International Sociology* 115.

43 Dima Jamali, ‘MNCs and International Accountability Standards through an Institutional Lens: Evidence of Symbolic Conformity or Decoupling’ (2010) 95 *Journal of Business Ethics* 617; see generally Hafner-Burton and Tsutsui, ‘Human Rights in a Globalising World’, above n 42.

44 Tony Evans and Jan Hancock, ‘Doing Something without Doing Anything: International Law and the Challenge of Globalisation’ (1998) 2(3) *International Journal of Human Rights* 1.

45 This is a principal theme of Hafner-Burton and Tsutsui, ‘Human Rights in a Globalising World’, above n 42.

46 See the references at above n 12.

47 See especially Hathaway, ‘Do Human Rights Treaties Make a Difference?’, above n 11; see also Oona A Hathaway, ‘Why Do Countries Commit to Human Rights Treaties?’ (2007) 51 *Journal of Conflict Resolution* 588.

48 Other research has noted the highly contingent nature of positive treaty effects depending on the pre-existing quality of democracy and rule of law in ratifying states: see, eg, Neumayer, above n 11, 925–6; see also Cole, above n 11, 1132.

49 Hathaway, ‘Do Human Rights Treaties Make a Difference?’, above n 11, 1941.

of treaties on the enjoyment of human rights at ground level, or to identify variables with predictive or explanatory power as regard treaties' compliance effects.<sup>50</sup>

### III TREATY MODELS: GAUGING THE RISK OF RITUALISM

Since the launch of the OEIWG in 2014, various BHR treaty models have been outlined,<sup>51</sup> some by academics in the field,<sup>52</sup> others by interested organisations.<sup>53</sup> Amongst these have been suggestions for:

- a comprehensive single BHR treaty addressing state obligations with regard to business-related abuses of all human rights, by all kinds of business enterprises;
- a 'declaratory instrument' that would reiterate or 'clarify' the scope of the state duty to protect and remedy human rights in respect of business-related abuses.<sup>54</sup> One version of this variant would also articulate a home state duty to protect against the human rights impacts of transnational corporations operating abroad;<sup>55</sup>
- a 'framework convention'<sup>56</sup> that might, for example, oblige states parties to adopt and implement an NAP;

<sup>50</sup> Cf Neumayer, above n 11.

<sup>51</sup> The OEIWG itself has not yet indicated a preference for any particular model, although its driving members appear to envisage a single comprehensive instrument intended as 'complementary' to the UNGPs: *OEIWG First Session Report*, UN Doc A/HRC/31/50, 6 [23], 8 [29], 9 [39]. See also Douglass Cassel and Anita Ramasastry, 'White Paper: Options for a Treaty on Business and Human Rights' (2016) 6(1) *Notre Dame Journal of International and Comparative Law* 1, 15. For a useful overview of the BHR treaty debate, see Justine Nolan, 'A Business and Human Rights Treaty' in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge, 2016) 70, 70–3.

<sup>52</sup> As noted at above n 13, we do not consider further here proposals for an instrument purporting directly to regulate corporate actors in human rights law as we see these ideas as unlikely to materialise, including for legal doctrinal reasons. Olivier De Schutter has canvassed the creation of an instrument establishing direct human rights obligations on corporations but only in relation to 'serious' violations: Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1 *Business and Human Rights Journal* 41, 58–62. For discussion of problems associated with 'direct' corporate obligations, see Claire Methven O'Brien, *Human Rights and Transnational Corporations: For a Multi-level Governance Approach* (PhD Thesis, European University Institute, 2009) ch 2.

<sup>53</sup> See especially *ICJ Report*, above n 5, 34–45, 47–9. See also Cassel and Ramasastry's 'illustrative options' for a treaty: Cassel and Ramasastry, above n 51, 17–30. A civil society 'Treaty Initiative' has convened an expert group to develop proposals on treaty design options: International Federation for Human Rights, 'FIDH and ESCR-Net New Joint "Treaty Initiative"' (Press Release, 30 January 2015) <<https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/16868-fidh-and-escr-net-new-joint-treaty-initiative>>. See also one panellist's suggested options as recorded in the *OEIWG Second Session Report*, UN Doc A/HRC/34/47, 17 [98].

<sup>54</sup> *ICJ Report*, above n 5, 9, 43–4; Cassel and Ramasastry, above n 51, 29–30.

<sup>55</sup> De Schutter, above n 52, 45–7.

<sup>56</sup> Ibid 55–7; *ICJ Report*, above n 5. According to Cassel and Ramasastry, this would be one type of 'national action' treaty: Cassel and Ramasastry, above n 51, 19, 24. The 'framework convention' model was also advanced by one panellist at the last OEIWG meeting: *OEIWG Second Session Report*, UN Doc

- a ‘subsidiary’ instrument on mutual legal assistance and legal cooperation between states in providing effective remedies to claimants;<sup>57</sup>
- optional protocols to the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*;<sup>58</sup>
- a ‘domestic criminalisation’ instrument modelled on the *United Nations Convention against Corruption* or the *Convention on the Protection of the Environment through Criminal Law*;<sup>59</sup>
- an ‘international criminalisation’ option comprising a treaty addressing corporate involvement in abuses that may also constitute offences under international criminal law, such as war crimes, crimes against humanity, and slavery or forced labour;<sup>60</sup>
- a ‘national action’ treaty obliging states to require a defined category of corporations to report on measure they have taken to implement human rights due diligence;<sup>61</sup>
- an ‘access to remedy’ convention obliging states to facilitate access to civil remedies in national courts via transnational torts and other claims for victims of business-related human rights abuses;<sup>62</sup>
- an ‘international enforcement machinery’ treaty.<sup>63</sup> In their scheme, for instance, Cassel and Ramasastry refer to models that would establish for BHR familiar human rights treaty processes that require progress reports on implementation, shadow reporting, and the review of state reports by an expert committee followed by the issuing of recommendations or observations, as well as individual or collective complaints mechanisms;<sup>64</sup>
- a ‘comprehensive’ model combining some or all of the elements of the ‘national action’ and ‘international machinery’ models;<sup>65</sup>

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A/HRC/34/47, 11 [56], 12 [65], 17 [98]. The NAP incorporation model is one advanced by O’Brien, ‘Submission to the OEIWG’, above n 15, 1–3.

57 De Schutter, above n 52, 63–6.

58 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976); see *ICJ Report*, above n 5, 41.

59 *United Nations Convention against Corruption*, opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 14 December 2005); *Convention on the Protection of the Environment through Criminal Law*, opened for signature 4 November 1998, ETS No 172 (not yet in force); see *ICJ Report*, above n 5, 40. Such an approach is also canvassed in Cassel and Ramasastry above n 51, 25–7.

60 Cassel and Ramasastry, above n 51, 25–7, 35–7.

61 Ibid 19–20.

62 Ibid 28–9; *ICJ Report*, above n 5, 36.

63 Cassel and Ramasastry above n 51, 30–8.

64 Cassel and Ramasastry include within this category the possibility of some new forum, or fora, for international civil adjudication or arbitration of claims for remedies based on business-related rights abuses, even if they appear sceptical about the prospects of new institutional mechanisms of this sort: *ibid* 32–5.

65 Ibid 37.

- a ‘policy coherence’ treaty that would involve states committing to review and amend national laws and international agreements to ensure that these are consistent with the existing state duty to protect human rights from business-related abuses;<sup>66</sup>
- ‘sectoral’ or ‘violation-specific’ treaties; an example of the latter being an instrument on human trafficking as it relates to corporate supply chains.<sup>67</sup>

In what follows we do not systematically assess each of these proposals by reference to the risk of their succumbing to ‘ritualism’. This is not simply for reasons of economy. Other factors also militate against a full exposition of all proposals in this article. Few of the above proposals have been fleshed out in detail. In addition, variation across proposals in terms of what they say about the scope and content of the legal obligations they advocate, as well as in terms of their intended structure, yields a highly heterogeneous set of design options.<sup>68</sup> Thus, for some proponents, the priority is criminalisation of corporate abuses whereas for others, the aim should be convergence amongst protection and remedial standards enacted at the national level. Meanwhile, some proposals do not aim at the establishment of a new BHR instrument as such but rather the incorporation of specific BHR components into existing legal frameworks and institutions.<sup>69</sup> Others again advance specific clauses that might sit within a future BHR treaty framework, without defining or elaborating that framework. For instance, some contributions are ostensibly BHR treaty design inputs but in fact address only isolated issues, such as the interface between states’ obligations arising respectively under human rights treaties and trade and investment agreements.<sup>70</sup> Moreover, such schema as do now exist present overlapping ‘types’ of treaties, of varying ‘strengths’. Thus, Cassel and Ramasastry’s 2015 mapping of ‘illustrative options’ describes a spectrum from a relatively undemanding regime requiring states to mandate public reporting by large companies, to a ‘strong’ treaty establishing civil and criminal remedies for business-related abuses in national and international judicial forums, or even a special court for such purposes.<sup>71</sup>

For present purposes, such a lack of uniformity amongst treaty proposals, in terms of key parameters, rules out comprehensive or coherent comparison between them. Notwithstanding, we suggest that it is still possible to advance some preliminary observations on the risk of ritualism attaching to some treaty

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66 Ibid 38–9.

67 Ibid 39.

68 Thus, an option to narrow a treaty’s scope by dealing only with ‘gross’ violations does not necessarily point to one or other structure or model of treaty. On the significant uncertainties and complexities of treaty scope in this area, see *ibid* 39–49.

69 Eg, expanding the International Criminal Court’s jurisdiction: see *ICJ Report*, above n 5, 39–40.

70 See, eg, Markus Krajewski, ‘Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model Clauses for a Treaty on Transnational Corporations, Other Businesses, and Human Rights’ (Study, CIDSE, March 2017); cf Lorand Bartels, ‘A Model Human Rights Clause for the EU’s International Trade Agreements’ (Study, German Institute for Human Rights, February 2014).

71 Cassel and Ramasastry, above n 51, 17 ff.

models. To narrow the scope of our analysis further, we deliberately set aside some of the above proposals from consideration, because they arguably face greater difficulties than those associated with ritualism. For example, De Schutter's proposal for an instrument affirming states' 'extraterritorial obligations' assumes that states have legal duties in respect of business abuses abroad, for which there is little evidence.<sup>72</sup> Likewise, a treaty focused on creating 'direct' human rights obligations of businesses under international law<sup>73</sup> would face profound problems of doctrinal coherence.

At the same time, it is worth noting that our analysis is partial in the sense that it has little to engage with because many proposals so far have not been advanced with reference to any explicit argument about their likely regulatory effectiveness, in their own terms or by comparison with alternative approaches. In our introduction, for example, we noted that the *ICJ Report* explicitly opts to '[set] aside' issues such as 'deficiencies in the practical application of standards'.<sup>74</sup> Rather, and without reference to empirical or other studies addressing human rights treaty effectiveness, it simply asserts that a new BHR instrument could address well-known state compliance problems by 'creating or reinforcing duties and mechanisms to facilitate domestic implementation'.<sup>75</sup> Further, it claims that 'implementation gaps such as those in monitoring, supervision or adjudication are problems *that international instruments usually help to solve*', which begs the question whether such instruments are in fact implemented and given domestic effect.<sup>76</sup> The *ICJ Report*, we suggest, is thus symptomatic of many pro-treaty contributions, in its lack of concern for regulatory effectiveness, failure to substantiate claims about compliance effects in the broader treaty effectiveness scholarship and reliance on somewhat circular reasoning.

Moreover, there would seem to be a greater risk of ritualism in cases where from the outset it is assumed that creation of an instrument will, of itself, resolve implementation gaps. Thus, it might even be that the strongest critique emerging from a ritualist perspective relates not to the susceptibility to ritualism of any particular treaty design, but to the participation, by treaty proponents themselves, in a ritual: namely that of automatically resorting to a treaty 'fix', without critical

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72 Ford, 'Bridging the Governance Gap', above n 7, 18–20. For critique of proposed treaty clauses relating to extraterritorial state obligations to regulate transnational firms operating abroad, see Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Case of Extraterritorial Overreach?' (Matters of Concern Series: Human Rights Research Paper No 2016/04, Danish Institute for Human Rights, 18 October 2016). See also John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc A/HRC/4/35 (19 February 2007) 6–7 [15]; *Protect, Respect, Remedy Report*, UN Doc A/HRC/8/5, 7 [19]. While these reports are now a decade old, there is scant evidence that state practice or *opinio juris* has materially shifted in the interim.

73 See, eg, Bilchitz, above n 13, 207–10.

74 *ICJ Report*, above n 5, 8.

75 Ibid 43. As discussed above, it further notes that a new instrument has 'clear potential' to be effective, without explaining what will ensure or define this effectiveness: at 41.

76 Ibid 8 (emphasis added).

reflection beforehand on whether such a solution is optimal, or even apposite, as a regulatory remedy for the underlying problems at hand.<sup>77</sup>

Returning to current treaty proposals, how do these fare when viewed through the lens of ritualism? Do some treaty models present a material risk of ‘perfunctory’ engagement<sup>78</sup> by states, while also displacing opportunities for more effective rights protection and remediation activities? Again, we acknowledge that there may be too little detail available as yet to support a categorical finding that ritualism would inevitably undermine one or more of those BHR treaty regimes listed above. Yet we do suggest that the risk of regulatory ritualism is unlikely to be uniform across different models, and can be expected to vary according to their specific characteristics and respective patterns of state participation.

For all the foregoing reasons, we restrict our preliminary analysis to the following four treaty proposal types.

### A Broad-Spectrum Single BHR Treaty

To date, the OEIWG has not itself proposed a particular treaty model,<sup>79</sup> but at least some of its members appear to envisage a comprehensive single instrument. Ruggie’s various objections in relation to ‘whether to treaty’<sup>80</sup> were probably strongest in relation to this kind of single overarching instrument,<sup>81</sup> including on grounds of opportunity cost; that is, the risk that states would invoke a treaty negotiation process as a pretext for prolonged inaction in relation to existing obligations and the UNGPs, and the reform momentum that a treaty process would thus absorb.

To such misgivings, we suggest, can be added the risk of ritualism. Based on state responses to the 2003 UN draft *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to*

77 Arguments in relation to extraterritorial state duties have also perhaps taken on a form of ritualism of their own, with some experts repeatedly asserting the existence of state duties as if repetition alone, without evidence of state practice, is capable of establishing such duties. De Schutter exhibits such circularity when, in arguing for the existence of a customary international law duty on states to regulate human rights and business extraterritorially, he cites as important evidence the ‘Maastricht Principles’, adopted by a group of academics of which he was himself a member: De Schutter, above n 52, 55, citing ETO Consortium, ‘Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (28 September 2011).

78 Oberleitner, above n 38, 1.

79 Its reports chronicle participant and panellist observations in response to a call to identify issues a treaty could address. With few exceptions (see, eg, the panellist recorded in the *OEIWG Second Session Report*, UN Doc A/HRC/34/47, 17 [98]), participants have offered only vague suggestions as to specific models and structure: for example, that any treaty should provide for ‘individual liability’ of corporate officers, or ‘an international court to enforce the treaty’: *OEIWG Second Session Report*, UN Doc A/HRC/34/47, 7 [23], 9 [40].

80 See, eg, *Protect, Respect, Remedy Report*, UN Doc A/HRC/8/5; cf John Ruggie, ‘Closing Plenary Remarks’ (Speech delivered at the Third United Nations Forum on Business and Human Rights, Geneva, 3 December 2014) 6 <[http://www.ohchr.org/Documents/Issues/Business/ForumSession3/Submissions/JohnRuggie\\_SR\\_SG\\_BHR.pdf](http://www.ohchr.org/Documents/Issues/Business/ForumSession3/Submissions/JohnRuggie_SR_SG_BHR.pdf)>.

81 See Mares, above n 35, 9.



*Human Rights*,<sup>82</sup> states' submissions during the drafting of the UNGPs, and now in the context of the OEIWG, it seems likely that such an instrument would fail to attract widespread participation and ratification, particularly amongst larger economies. Accordingly, a broad-spectrum treaty addressing all human rights, all business enterprises and seeking to establish business obligations to uphold human rights on the same footing as those of states might be highly susceptible to empty, formalistic state compliance, yet at the same time providing a pretext for the position that the issue is now being internationally 'regulated' so that no more need be done. At the very least, an OEIWG-led process that did not consider how a treaty mechanism would assimilate or connect with existing UN forums might be viewed as a token, ritualistic or symbolic new gesture.<sup>83</sup> If the most significant governance gap in relation to BHR is the failure to honour and enforce existing laws,<sup>84</sup> proponents of new regimes surely need to explain by what mechanisms these will promote compliance, rather than merely recapitulating a list of obligations that will remain unmet.<sup>85</sup>

## **B Narrow-Spectrum BHR Treaty on Abuses Amounting to International Crimes**

By contrast, proposals for a narrow-spectrum treaty addressing only those business-related human rights rising to the level of international crimes may be plausible in terms of legal principle. Yet they similarly lack practical and political viability. Excluding a broad swathe of serious business-related rights abuses, particularly of a socioeconomic nature, they appear unlikely to satisfy a treaty's non-state advocates. Hence, like the option of a general-scope treaty, a narrow scope instrument also appears vulnerable to empty, formalistic state compliance, though for different reasons: a lack of civil society engagement would weaken accountability with review procedures consequently reduced to states' self-policing.

82 Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55<sup>th</sup> sess, 22<sup>nd</sup> mtg, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2004, adopted 13 August 2003); cf *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, Commission on Human Rights Dec 2004/116, 60<sup>th</sup> sess, 56<sup>th</sup> mtg (20 April 2004) in Commission on Human Rights, *Report on the Sixtieth Session*, UN ESCOR, 60<sup>th</sup> sess, Supp No 3, UN Doc E/2004/23 (2004) ch II(B) 332–3.

83 This may be one of the intentions behind the European Union's observations in the *OEIWG Second Session Report*, UN Doc A/HRC/34/47, 4 [14]. One panellist is recorded as noting that any binding instrument should be developed in a way that recognises and addresses the reasons why existing mechanisms suffer from compliance and enforcement gaps: at 9 [38].

84 John Ruggie, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Further Steps Towards the Operationalisation of the 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/14/27 (9 April 2010) 5 [18].

85 It is worth noting that the *ICJ Report* does not fully explain its support for 'decoupling' a treaty process from the UNGPs: *ICJ Report*, above n 5, 45.

### C Declaratory Instrument

Various proposals have focused on a ‘declaratory’ instrument which would ‘usefully list’,<sup>86</sup> ‘make explicit’<sup>87</sup> or clarify states’ existing duties<sup>88</sup> (for example, to provide effective remedies). This treaty type might conceivably secure a measure of consensus and renew, at least temporarily, the UNGPs’ momentum while strengthening their normative basis, and so be thought likely to promote further convergence in state and business practice. Yet at the same time these models arguably raise the spectre of repetitive recitation, a form or symptom of ritualism, while clear articulation of how their merits would offset their risks remains lacking. In discussing this model, De Schutter, for instance, does not explain what the added regulatory value of a declaratory instrument simply listing states’ existing duties might be. Should a declaration have merit in regulatory terms, this in any case needs to be weighed against the ‘downsides’ highlighted by the ritualism critique, and in particular the effect that repetitive gestures can have in obscuring state inaction on substantive matters.

State duties relating to BHR have been affirmed by the relatively recent and unanimous Human Rights Council resolutions on the UN ‘Protect, Respect, Remedy’ Framework and UNGPs respectively adopted in 2008 and 2011.<sup>89</sup> Unless in the guise of a ‘declaration’ what is proposed is in fact a treaty establishing more onerous duties than now exist,<sup>90</sup> states gathering to ‘agree’ a merely declaratory instrument might be characterised, from the perspective of Charlesworth’s critique, as engaged in a ritualistic recitation of existing obligations. Would such a process and product merely add more ‘noise’ to the existing ‘cascade of words’ in the global human rights system?<sup>91</sup> If not, through what mechanisms would such a performance enervate national-level implementation? Arguably, proponents of a declaratory regime ought to at least take the ritualism risk seriously enough to explain why it is negligible, or worth taking for other reasons.

### D Framework Convention

The main elements of a framework treaty built around NAPs and the UNGPs, we suggest, would include broad commitments by states with reference to the UNGPs to adopt appropriate national measures to implement relevant international norms, in this case, the 2008 UN ‘Protect, Respect, Remedy’ Framework, and to promote their effective implementation. It would also include

86 De Schutter, above n 52, 64. De Schutter talks of simply listing state obligations under a proposed ‘subsidiary’ model: at 64; and discusses a declaratory instrument on extraterritorial obligations: at 46.

87 Cassel and Ramasastry, above n 51, 29.

88 *ICJ Report*, above n 5, 9, 43–4.

89 *Protect, Respect, Remedy Framework Resolution*, UN Doc A/HRC/RES/8/7; *Guiding Principles Resolution*, UN Doc A/HRC/RES/17/4.

90 In particular, as noted above, on the question of extraterritorial obligations, De Schutter appears to concede an instrument prescribing such a duty would be ‘highly controversial’, suggesting the duty is in fact not already established in international law and ready to be ‘declared’ in a treaty: De Schutter, above n 52, 66.

91 Ford, ‘The Risk of Regulatory Ritualism’, above n 16, 17.

undertakings to consider in future the adoption of additional measures on specific issues (such as supply chain due diligence or access to judicial remedies) via protocols or other procedures. Finally, it would embody a specific commitment to develop an NAP, through an appropriate multi-stakeholder, participatory national process, and periodically to present it and participate in peer dialogue or review at the international or regional levels.<sup>92</sup>

If it is true that scholars have not yet engaged in in-depth theorisation or empirically-informed evaluation of the relative or absolute effectiveness of this type of regime, at first glance such a BHR ‘framework convention’ might also seem susceptible to ritualism. For example, it is not self-evident that any instrument according to which states would agree to undertake NAP processes or submit NAPs for peer review would necessarily increase ‘accountability ... policy coherence ... accelerate[d] collective learning ... and gradual convergence’.<sup>93</sup> De Schutter accepts that for this to happen would require a ‘robust follow-up mechanism at international level’, but does not outline how a convention might create such a mechanism.<sup>94</sup> Cassel and Ramasastry similarly note the option of a ‘framework’ treaty that could be inclusive and not too demanding but which might ‘set in motion an ongoing process of review and elaboration of additional standards over time’.<sup>95</sup> Yet they acknowledge as equally likely that it might fail to generate gradual improvements and displace momentum for action.<sup>96</sup> Others have observed that the promise of state activity on NAPs under the UNGPs may need to be weighed against the risk that the process (alternatively, ceremony or ritual) of NAP production might act as a ‘fig leaf’ for substantive inaction.<sup>97</sup>

Nevertheless, the risk of ritualism emerging under a framework convention might be worth taking given reasons to think this risk is limited and that such a convention would, despite it, promote substantive ‘cumulative progress’.<sup>98</sup> Here we identify five.

First, there are various precedents for this model beyond the BHR area including the *WHO Framework Convention on Tobacco Control* which, with 168 signatories, is one of the most subscribed-to treaties in the UN system.<sup>99</sup> This suggests that the framework convention approach is at least in principle amenable to wide state participation.

Second is the existence of a strong mandate for UNGPs-focused NAPs. The Council has called on UN member states to produce NAPs,<sup>100</sup> as have the

92 Here we build on O’Brien, ‘Submission to the OEIWG’, above n 15, 4.

93 De Schutter, above n 52, 56–7.

94 Ibid.

95 Cassel and Ramasastry, above n 51, 24. They also note that a framework convention would not satisfy those who think that an instrument should provide for remedial options for particular allegations of violation: at 25.

96 Ibid 25.

97 O’Brien et al, ‘Current Status and Future Prospects’, above n 14, 121.

98 Mares, above n 35.

99 Opened for signature 16 June 2003, 2302 UNTS 166 (entered into force 27 February 2005). See also WHO, *WHO Framework Convention on Tobacco Control* (2017) <<http://www.who.int/fctc/en/>>.

100 *Human Rights and Transnational Corporations Resolution*, UN Doc A/HRC/RES/26/22, para 2.

European Union<sup>101</sup> and Council of Europe<sup>102</sup> with respect to their members.<sup>103</sup> NAPs-related processes are underway in approximately 40 countries worldwide, a level of implementation effort that is not insignificant given the short time that has elapsed since 2011.<sup>104</sup> Numerous states participating in the OEIWG in 2016 alluded to their engagement in NAP processes. This indicates a healthy measure of political support for NAPs and, given that governments are under no formal obligation to deliver them, suggests that they are seen by governments as having sufficient value to justify the time and resources being deployed. While this does not necessarily obviate the risk of ritualism, it does suggest at least the possibility of a more engaged approach than ritualistic compliance would entail.

A third factor is the primacy of the national level in defining BHR regulations that a framework convention should afford. If BHR norms are to be truly effective, they need to penetrate every area of national policy, from food to finance, corporate governance to court procedure. This means that scope to consider, and respond to, the peculiarities of each country's national context in the course of devising implementation measures is essential. In addition, the more detailed the prescriptions a conventional treaty might make, for instance, regarding the class of companies obliged to perform human rights due diligence, the less likely it will be that such rules can or will be universally implemented; the more general a treaty's prescriptions, the more it would duplicate what the UNGPs framework already reaffirms, so raising the spectre of rhetorical ritual. Detailed BHR rule-making, to have traction, relevance and a chance of practical application, should hence occur at national level, but within a global framework and situated within a shared discourse. Combined with mechanisms for reporting on and reviewing them at a global or regional level, NAPs should thus provide an impetus for making such rules as well as for reviewing their effectiveness, together with relevant non-governmental organisations and other constituencies, on an ongoing basis.

This links to a fourth reason to favour an NAPs-based model, which relates to meaningful and inclusive engagement of various state and, crucially, non-state constituencies (eg, non-governmental organisations), especially at the national

101 European Commission, 'Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Renewed EU Strategy 2011–14 for Corporate Social Responsibility' (COM (2011) No 681 final, 25 October 2011).

102 Committee of Ministers, Council of Europe 'Recommendation CM/Rec (2016)3 of the Committee of Ministers to Member States on Human Rights and Business' (2 March 2016).

103 The Organisation for Economic Co-operation and Development ('OECD') has also hosted discussions of NAPs in the context of its annual Global Forum on Responsible Business Conduct in 2015 and 2016: see Angel Gurría, Secretary General of the OECD, 'Opening Remarks' (Speech delivered at the Third Global Forum on Responsible Business Conduct, Paris, 18 June 2015). Likewise, NAP discussions have been integrated into meetings of the UN Economic Commission for Latin America and the Caribbean: see, eg, Economic Commission for Latin America and the Caribbean, 'Agenda for Regional Consultation' (Prepared for the Regional Consultation for Latin America and the Caribbean on Public Policy for the Implementation of the UN Guiding Principles on Business and Human Rights in the Framework of the 2030 Agenda on Sustainable Development, Santiago, 2–3 March 2016).

104 On the other hand, so far only seven NAPs have finally been adopted worldwide: Office of the High Commissioner for Human Rights, *State National Action Plans* <<http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>>.

level. Without active local engagement from both rights-holders and duty-bearers, the advancement of human rights proceeds falteringly, if at all. While the message from the very top is important, ultimately human rights must be absorbed into the organisational values of public and private institutions at macro and micro levels and assimilated into their rules and codes. Though universal guarantees are essential, only from direct encounters can increased mutual understanding, trust, and collaborative problem-solving emerge. Inclusive, participatory, deliberative and iterative NAP processes should create multiple opportunities to strengthen the knowledge and capacities of national and local actors on BHR; to bring key stakeholders together; to engender new networks and partnerships; and, where affected communities and individuals are adequately involved, to let those on the hard end of globalisation claim their rights and speak truth to power.<sup>105</sup> By contrast, and though the picture is in some respects improving, centralised, Geneva-based human rights treaty processes too often give precedence to ritualistic form over substance, remaining remote and inaccessible to the rights-holders and indeed the duty-bearers who should be their principal concern.<sup>106</sup>

Fifth, such a framework convention might act as a platform for building consensus, policy learning and cross-fertilisation.<sup>107</sup> Because of the novelty and complexity of the BHR agenda, knowledge on ‘what works’ in terms of regulatory techniques and legislative models is still sparse. Countries are in the course of experimentation (for example, in the areas of supply chain responsibility and transparency) but a firm evidence-base and agreed criteria on which to judge the relative strengths and weaknesses of different approaches, much less the ‘successes’ and ‘failures’, is still lacking. National experiences captured in NAPs and ongoing global or regional review and dialogue based on NAPs, would provide invaluable raw data. Rather than imposing a single model of regulation across the board, as single comprehensive or narrow-spectrum instruments might, such an approach would allow policy innovation to flourish continuously, and dynamically, in response to new issues, risks and technologies, as they develop. At the same time, NAPs and a structured review process are apt to render countries’ various efforts much more visible to a global audience, potentially promoting and accelerating convergence around those models and interventions that seem capable of delivering the best results. That is, a framework convention that promoted rituals of reporting on NAPs processes and implementation might nevertheless have value if it generated, over time, a body of learning and community of encouragement on national-level protection, promotion and remediation measures.

105 See O’Brien et al, ‘National Action Plans: A Toolkit’, above n 14, ch 6, for illustrative guidance on how, in practical terms, inclusive, participatory NAP processes might be secured.

106 For such criticisms in relation to UN treaty monitoring bodies, see literature reviewed by O’Flaherty and O’Brien, above n 11.

107 These arguments are also advanced by De Schutter, above n 52, 57, and Cassel and Ramasastry, above n 51, 24–5. For an overview of literature suggesting why a framework convention rather than a traditional ‘command and control’ treaty model would be likely to deliver such outcomes, drawn from social theory, public administration, regulation theory and international relations, see O’Brien, *Human Rights and Transnational Corporations*, above n 52, ch 6 (‘Multi-level Governance’).

#### IV RITUALISM IN THE CONTEXT OF A FRAMEWORK CONVENTION: FURTHER REFLECTIONS

Some of these arguments in favour of a framework convention find resonance in regulatory theory – and in the ritualism critique in particular. As noted above, Charlesworth's project observed a tension and overlap between rituals and ritualism,<sup>108</sup> and proceeded on the basis that ritualism, rather than rituals per se, may be problematic in the international human rights system.<sup>109</sup> To recall, rituals and symbolic performances may transmit social meanings and express community aspirations as well as embody power relations in fundamental ways, and so have certain regulatory or transformative power, or significance for building community consensus or social cohesion.<sup>110</sup> Rituals can thus be important means for 'reaffirming and legitimising' some core values,<sup>111</sup> and can be 'markers of success' suggesting a way of thinking has achieved some permanence and importance.<sup>112</sup> While the rituals of human rights reporting and review have deep political implications and are riven with complex power relations, Charlesworth's project concluded that these rituals might be neither inherently transformative nor inevitably conservative.<sup>113</sup> Likewise, human rights review processes and recommendations are not necessarily meaningless or empty but rather embody a form of obligation or at least expectation that has potential regulatory significance.<sup>114</sup> Charlesworth and Larking identified the scope for seeing rituals of human rights reporting in Geneva as capable of generating 'politically engaged transformation' and greater state coordination and communication on human rights, such that these rituals may be 'a step on a journey' towards substantive state human rights compliance.<sup>115</sup> Given state sensitivities, rituals that engage states' participation in the rhetoric of obligation may have considerable regulatory value and empowering potential, or at least some redeeming features. That is, there may be value in the consequences of human rights treaties and their ratification, such as their signalling, reinforcing effect, their effect in framing politics in a shared normative vocabulary through which non-state actors can engage the state.<sup>116</sup> To the extent that reducing contestation is beneficial, UN rituals at Geneva, by their inclusive nature, can

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108 Charlesworth and Larking, 'Regulatory Power', above n 12, 18.

109 Authers et al, 'Paper for The Rituals of Human Rights Workshop', above n 12, 4–5.

110 Ibid 1.

111 Kälin, above n 37, 33.

112 Charlesworth and Larking, 'Regulatory Power', above n 12, 9.

113 Authers et al, 'Paper for The Rituals of Human Rights Workshop', above n 12, 6. The contributors see their project as 'open' concerning whether or not, ultimately, rituals advance human rights principles, while arguing that if they result in ritualism, that is problematic: at 6.

114 Oberleitner, above n 38, 4. For how UPR rituals can help resistant states to engage on human rights in a less confronting way, allowing for norms to infiltrate their practices, see, eg, Cowan, above n 40, 51–2; Bulto, above n 33, 253–4.

115 Charlesworth and Larking, 'Regulatory Power', above n 12, 18. The authors elsewhere describe the ritual strengths of the UPR as 'rallying participants around a common cause and reaffirming common rules and values': at 11, citing Kälin, above n 37.

116 See also Cassel, 'Does International Human Rights Law Make a Difference?', above n 11, 130.

reduce such contestation, promoting state engagement.<sup>117</sup> Simply by engaging in treaty and other reporting processes in the language of human rights, it might be said, even a recalcitrant state implicitly asserts the validity and relevance of human rights guarantees, contributing to at least some consensus, even a weak one.<sup>118</sup> Cowan thus qualifies the ritualism critique, seeing human rights positives in ‘the effects of “just” going [ritualistically] through the motions’ of reporting procedures, in terms of repetitive reiterations producing a certain normative reality.<sup>119</sup>

Thus, if some human rights rituals oblige states to act, in public forums and performances before their peers and others, as if they take their human rights obligations seriously,<sup>120</sup> this might be worth something in the wider scheme of things. This may be especially true if the regulatory field in question is still emerging, as with BHR. That is, while the performance of implementation that accompanies state acceptance of a human rights treaty commitment may be or become ritualised performance, there may be ‘some power inherent in the performative moment itself’.<sup>121</sup> This is because the processes may afford rare opportunities for dialogue, reflection, sharing or learning, and pressure on abusive or neglectful state conduct.

This would seem true especially where states’ participation and rhetorical commitment creates something for national and transnational civil society networks to follow up at home, including by invoking the norms to which the state has publicly given rhetorical commitment abroad.<sup>122</sup> The ritualism critique would accept that states may commit to such regimes knowing that they are largely rhetorical, ritualistic and mainly harmless, in the sense of not threatening a state with reasons to avoid scrutiny of its human rights record. Yet they may, once on board the regime, become progressively socialised towards underlying regulatory objectives,<sup>123</sup> internalising the substantive norms, or at least aspects of them, through participating even in a relatively ‘perfunctory’ manner in the rituals. By at least accepting and contributing to rhetorical human rights commitments, states may find it harder, in a legitimacy sense, to avoid altogether acting on them. Alternatively, whatever their position during negotiations and ratification, their participation in an ongoing treaty regime may be part

117 Charlesworth and Larking, ‘Regulatory Power’, above n 12, 9. This is also part of Cowan’s argument: see Cowan, above n 40, 52, 54–5.

118 Kálin, above n 37, 33.

119 Cowan, above n 40, 51–2.

120 Authers et al, ‘Paper for The Rituals of Human Rights Workshop’, above n 12, 6.

121 Ibid; Authers et al, ‘Introduction: The Rituals of Human Rights’, above n 12, 14.

122 Abram Chayes and Antonia Handler Chayes, ‘On Compliance’ (1993) 47 *International Organization* 175, 185–7. See also Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995); Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999).

123 Harold Hongju Koh, ‘How Is International Human Rights Law Enforced?’ (1999) 74 *Indiana Law Journal* 1397, 1407.

of a process of ‘socialisation’<sup>124</sup> during which commitment to the substantive regulatory goals may build or be built.

Participation in human rights treaty regimes is ‘not always predicated on myth and ceremony’.<sup>125</sup> Still, in principle it is hard to deny that the merely ceremonial dimensions of treaty membership and participation might be improved upon where forms of evaluation, assessment, peer review or complaint reduce the scope for disingenuous participation and raise the ‘legitimacy costs’ and risks of being shown to deviate from one’s rhetorical, ceremonial or ritualised commitments.<sup>126</sup> States may participate in a regulatory regime in a perfunctory or even subversive manner to begin with, yet find themselves ‘drawn into more meaningful commitments’ through their representatives’ experiences and their desire for peer acceptance and respect.<sup>127</sup>

This accords with international relations scholarship on the normative and compliance-inducing effect of committing to multilateral regimes even absent sanctions for non-compliance and perhaps irrespective of the binding or non-binding nature of the commitments.<sup>128</sup> Unless one adopts an extreme realist perspective it is difficult to deny that rhetorical, symbolic, formal, peer commitment to high standards may generate the conditions for gradual internalisation and foster peer convergence, learning and communication, capacity-building, and so on.<sup>129</sup> The approach also resonates with ‘responsive’ (and perhaps ‘new governance’<sup>130</sup>) regulation theories, which posit that regulatory approaches are more effective, legitimate and coherent where they privilege dialogic, cooperative techniques to build participants’ capacity to comply and

124 See Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford University Press, 2013). See also Bell’s discussion of Durkheim’s ideas of states becoming socialised through engagement with systems based on common values: Catherine Bell, *Ritual: Perspectives and Dimensions* (Oxford University Press, 2009) 24–5, referred to by Kälin, above n 37, 40. Bulto argues, without reference to this literature, that human rights ritualism may ‘enhance the socialisation’ of African states and their ‘eventual integration into a global culture of human rights’: Bulto, above n 33, 254.

125 See Cole, above n 11, 1165.

126 See Karolina Milewicz and Robert E Goodin, ‘Deliberative Capacity Building through International Organisations’ (Meeting Paper, American Political Science Association, 6 August 2012) 10–11; cited, in unpublished form, by Charlesworth and Larking, ‘Regulatory Power’, above n 12, 20.

127 Charlesworth and Larking, ‘Regulatory Power’, above n 12, 20. See also Kälin, above n 37, 38–9.

128 See especially Chayes and Chayes, ‘On Compliance’, above n 122; Chayes and Chayes, *New Sovereignty*, above n 122; see also Peter M Haas, Robert O Keohane and Marc A Levy, ‘Introduction’ in Peter M Haas, Robert O Keohane and Marc A Levy (eds), *Institutions for the Earth: Sources of Effective International Environmental Protection* (MIT Press, 1993) 1; Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2000).

129 See Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds) *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013). Charlesworth and Larking note, not with reference to this literature, how involvement over time in a cooperative regime might induce internalisation by participants of the regime’s goals: Charlesworth and Larking, ‘Regulatory Power’, above n 12, 20.

130 For some discussion of these theories in relation to BHR, see John Gerard Ruggie, ‘Global Governance and “New Governance Theory”: Lessons from Business and Human Rights’ (2014) 20 *Global Governance* 5.



inclination to see the regulatory goals as in their own longer-term self-interest.<sup>131</sup> Such theories do not necessarily extend to the quality of compliance, or the mechanisms by which incremental commitment to the substantive goals of the treaty occurs as a matter of course. That is, although compliance may be the normal organisational posture associated with membership of a treaty regime that a state has gone to the trouble of engaging with,<sup>132</sup> this is not particularly encouraging if what counts as ‘compliance’ is the fulfilment of formal procedural requirements marked by disjunction from substantive compliance and without internalising of the normative values. Ritualistic conformity may be more problematic in a regulatory project than outright resistance to that project; resistance is a posture that at least conveys some degree of substantive engagement, as opposed to the non-engagement that might accompany perfunctory compliance.

If rituals themselves are not necessarily problematic and are potentially productive of substantive human rights progress, the challenge becomes that of shifting state participants in the human rights system towards a committed position on the substantive aims of any particular instrument or regime. Indeed, Charlesworth’s project saw its ‘underl[ying]’ question as being whether problematic human rights ritualism can be transformed into conformity or commitment.<sup>133</sup>

Charlesworth’s project’s ultimate finding was that the scope for the UPR and human rights treaty procedures to transcend ritualism and act as empowering regulatory mechanisms ‘depends heavily on effective NGO and civil society engagement’ in those processes.<sup>134</sup> A treaty model might create space for what Charlesworth and colleagues saw as regular ‘productive disruption’ through using human rights reporting (and other) rituals to escape and contradict deflective, unengaged ritualism, or it might not.<sup>135</sup> The way in which a treaty is designed to incorporate roles for ‘disruptive’ non-state actors, including national

131 For the classic articulation of responsive regulation theory, see Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992). For a recent overview, see John Braithwaite, ‘Fasken Lecture: The Essence of Responsive Regulation’ (2011) 44 *University of British Columbia Law Review* 475. Charlesworth’s research project discussed at above n 12 drew on ideas of ritualism developed in the context of responsive regulation theory, principally by John Braithwaite.

132 Chayes and Chayes, ‘On Compliance’, above n 122, 179.

133 Charlesworth and Larking, ‘Regulatory Power’, above n 12, 11. The authors cite Valerie Braithwaite’s typology of motivational postures adopted by subjects of regulation (‘game-playing’, ‘disengagement’, ‘resistance’, ‘capitulation’, and ‘commitment’): Valerie Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (Edward Elgar, 2009) 77–9. See also Braithwaite, Makkai and Braithwaite, above n 12, 295. For an alternative typology of regulatory posture, see Christine Oliver, ‘Strategic Responses to Institutional Processes’ (1991) 16 *Academy of Management Review* 145. See also influential theories of the range of responses to normative regimes in Robert K Merton, *Social Theory and Social Structure* (Free Press, 1968). The treaty debate in this field has not to date engaged with insights generated by any of these studies in considering what design of instrument might best achieve commitment to the overall objective.

134 Charlesworth and Larking, ‘Regulatory Power’, above n 12, 16.

135 Authers et al, ‘Introduction: The Rituals of Human Rights’, above n 12, 14–15. Thus, civil society might be empowered by a state’s ratification even, or perhaps even especially, if the state fails then to implement it.

human rights institutions, civil society organisations, and the media, may therefore be crucial to outcomes.

For us, then, the question would be how BHR treaty designs might shift states, over time, towards more committed, less perfunctory engagement by maximising or at least promoting the potential for disruption. Conceivably, an NAP-focused framework convention regime, by contrast with other treaty models, if it insisted on participatory, transparent and equitable procedures at national as well as international levels, and were based on the already widely accepted UNGPs, might provide more spaces, and more accessible deliberative nodes for state and non-state constituencies, for influencing transformation in the posture of a state towards its duties to regulate, in ways that substantively improve enjoyment of human rights.

## V CONCLUSION

While the ‘whether to treaty’ question is by no means settled in the BHR field, the OEIWG’s institutional mandate in the Human Rights Council means that the ‘how to treaty’ question is receiving greater attention. Multilateral treaties come in a wide variety of forms, and the risks of ritual performance are undoubtedly greater in some forms than others. Scope exists for exploring an effective, legitimate and coherent international regime with some compromise between ‘the perfect and the good’<sup>136</sup> without being trapped in models of the past.<sup>137</sup> The premise of this article has been that post-2014 proposals for a BHR treaty have not sufficiently articulated or sought to incorporate definitions, criteria or theories of effectiveness. One important criterion, we suggest, is the need to avoid patterns of formalistic process-based compliance: ‘regulatory ritualism’. Our underlying research question has been whether, and to what extent, the successful negotiation of a dedicated instrument in the field of conduct covered by the UNGPs might, contrary to the promise of galvanising significant state action, raise the spectre of empty and falsely reassuring ritualism in state compliance. However, we have argued that compliance rituals (such as might accompany an NAP-based framework convention) are not necessarily without possible value in a longer-term effort to build consensus and convergence in this emerging area.

Human rights treaties and other rituals have some transformative, consensus-building potential. Yet it is a fine line, since ritualism is never far from rituals,<sup>138</sup> and the tendency to ritualism is intrinsic to human rights rituals notwithstanding

136 Harriet E Berg, ‘The Perfect, the Good, and Unclear Conflict Lines’ on Business and Human Rights Resource Centre, *Debate the Treaty* <<https://business-humanrights.org/en/the-perfect-the-good-and-unclear-conflict-lines>>.

137 De Schutter, above n 52, 43.

138 Kälén, above n 37, 39, 40. See also Shane Chalmers, ‘The Beginning of Human Rights: The Ritual of Preamble to Law’ (2017) forthcoming *Humanity* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2707826](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707826)>. Chalmers notes that while some rituals of human rights might be constructive, the universal broad language of rights coupled with the ‘constant performance’ involved in human rights processes makes these regimes ‘ever-vulnerable’ to ritualism: at 22.

their transformative potential.<sup>139</sup> If the ritualism risk does materialise in a significant way in the design of a proposed treaty on BHR, that process and its outcome may have constituted a serious opportunity cost on alternative measures to promote state operationalisation of the UNGPs and their related framework. Central to the ritualism critique is that the possible convening, socialisation, and rhetoric-to-obligation effects of treaty participation may hold some regulatory promise. However, the critique would maintain, certain patterns can risk overshadowing that promise or potential. These are the risks that, especially over time, repeat performances of formal procedures become seen as the point of the overall exercise, while giving false reassurance that states are acting substantively on their obligations, and while tending to occupy the political space for articulating the relevant human rights demands.

Ritual performances that count as ‘compliance’ not only enable participant states to lose sight of or to obscure the overall goal of promoting human rights standards. They may also promote a profound accountability paradox. This is that procedure-heavy systems ostensibly designed to publicise information, facilitate peer review and engender continuous improvement may in fact operate to obscure accountability. We would conclude that there is a reasonable risk of the ritualism problem materialising in relation to a comprehensive treaty on BHR. This is at least so in relation to any of the forms that would be likely to garner sufficient state support: as noted in our introduction, a value-adding treaty may not be viable, but a viable, undemanding treaty might add little value and represent mere ritualistic incantations about rights. Yet our brief exploration of the merits of a framework convention model, notwithstanding the ritualism risk we also identify with such a model, illustrates the need to qualify this ritualism critique. This is because the risk of ritualism might be traded off against the possible gains in terms of consensus-building, sharing and learning, and inclusivity in dialogue on addressing business-related human rights risks at inter-state and national levels.

In the introduction, we registered a caveat to the statement that our focus was not on *whether* any treaty at all was a good idea. This caveat was needed because many actors focused on negotiating a binding international instrument appear to place unfounded expectations on public international law as a regulatory medium,<sup>140</sup> and ignore the realities and attractions of plural sources and modes of governance,<sup>141</sup> while confusing the means (treaties are only one kind of regulatory intervention) with the ends (greater enjoyment of human rights). International law is not a regulatory ‘silver bullet’.<sup>142</sup> On the other hand, treaty

139 Authors et al, ‘Introduction: The Rituals of Human Rights’, above n 12, 14.

140 See Brett Bowden, Hilary Charlesworth, and Jeremy Farrall (eds), *The Role of International Law in Building Democracy and Justice after Conflict: Great Expectations* (Cambridge University Press, 2009).

141 See John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000); Rodney Bruce Hall and Thomas J Biersteker, ‘The Emergence of Private Authority in the International System’ in Rodney Bruce Hall and Thomas J Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge University Press, 2002); David Vogel, ‘Private Global Business Regulation’ (2008) 11 *Annual Review of Political Sciences* 261.

142 Nolan, above n 51, 72; see generally Mares, above n 35. Ruggie has urged treaty proponents to free themselves from ‘conceptual shackles’ tied to fixed ideas about formal and public law as the only

sceptics' calls for 'polycentric' regulatory approaches in this field should not preclude an examination of what treaty design innovations might best promote or complement other sources of governance in the BHR's overall regulatory 'ecosystem'.

Nevertheless, one effect of accepting the risk of ritualism may be that the onus should be seen as shifting onto those advancing treaty proposals to explain how their models will avoid or contain that risk. This must be so in light of the empiricism of the more general treaty effectiveness literature, and the fact that states already have clear duties in the field of BHR, and no treaty negotiation is needed to ground these. In this sense, the ritualism critique may make it more difficult in this field to keep separate the questions of 'how to design a treaty' from 'whether a viable treaty would add any value'.

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regulation that matters: John G Ruggie, 'Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights' (2015) (unpublished) 9 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2554726](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726)>.